ORIGINAL

In the

Supreme Court of the United States

ILYA WOLSTON, Petitioner, v. READER'S DIGEST ASSOCIATION, INC., ET AL., Respondents.	)	No. 78-5414

Washington, D. C.
April 17, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

ILYA WOLSTON, Petitioner,	:	
v.	:	No. 78-5414
READER'S DIGEST ASSOCIATION, INC., ET AL., Respondents.	:	

Washington, D. C.

Tuesday, April 17, 1979

The above-entitled matter came on for argument at 11:41 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

SIDNEY DICKSTEIN, ESQ., Dickstein, Shapiro & Morin, 2101 L Street, N. W., Washington, D. C. 20037; on behalf of the Petitioner

JOHN J. BUCKLEY, JR., ESQ., Williams & Connolly, 839 - 17th Street, N. W., Washington, D. C. 20006; on behalf of the Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Wolston v. Reader's Digest.

I think you may proceed whenever you are ready, Mr. Dickstein.

ORAL ARGUMENT OF SIDNEY DICKSTEIN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DICKSTEIN: Mr. Chief Justice, and may it please the Court:

The petitioner in this case is Ilya Wolston, who is the nephew of Jack and Myra Soble, admitted Soviet espionage agents. Following the Sobles' arrest in 1957 and their later plea of guilty to espionage charges, Wolston received and failed to comply with a grand jury subpoena. Following commencement of the trial on the resulting contempt charge, Wolston pleaded guilty, received a one-year suspended sentence conditioned on his future cooperation with federal authorities and was placed on three years probation.

Newspaper stories relating to Wolston's failure to appear, his contempt hearing, his plea and his sentence were published between July 15 and August 14, 1958. As the District Court observed, however, Wolston had led a thoroughly private existence and he was generally unknown until his failure to appear before the grand jury became public knowledge. And after the flury of publicity attending his

conviction ceased, he apparently succeeded for the most part in resuming his private life.

The defamatory statements at issue here are found in a book entitled "KGB: The Secret Work of Soviet Agents," which was written by John Barron, an employee of the Reader's Digest Association, Inc. It was published in 1974 by the Reader's Digest Press and republished by two book clubs and in paperback by Bantam Books.

The defamatory statements in the book identified petitioner as a Soviet agent undifferentiated from the Rosenbergs, William Remington, Judith Coplon, Harry Gold and other infamous figures of Soviet espionage. A footnote to the identification of Wolston as a Soviet agent can be read to mean that petitioner had been indicted for espionage as well as convicted of contempt of court.

Following petitioner's filing of this action, a diversity action in the District of Columbia, the author of KGB was deposed. He testified that his identification of Wolston as a Soviet agent was predicated upon a 1960 FBI report --

QUESTION: Mr. Dickstein, could I ask you the same question I asked counsel in the case preceding this, then the source of law is District of Columbia law?

MR. DICKSTEIN: The source of law insofar as federal issues are not concerned is, of course, the District of

Columbia.

QUESTION: The basic right rises out of District of Columbia law?

MR. DICKSTEIN: That is correct.

Barron also testified that prior to and while he was writing KGB, he was completely familiar with a book entitled "My Ten Years as a Counterspy," which was written by Boris Morros and published in 1959. In this book, Morros recounts that Soble has identified his nephew Wolston as Slava, a person who had purportedly funished Soble with information. Morros' book referred to Wolston's sentence for contempt of court, but the book concluded that he knew nothing about Wolston's activities except that which Soble "a confirmed liar" had told him.

Barron testified that notwithstanding his authorization to invest as much time in research as necessary on the book, the full backing of the Reader's Digest organization, the assignment of a full-time researcher, his use of the worldwide research facilities of the Reader's Digest, and cooperation by the FBI and other federal agencies which had been assured and which he received.

In the over four years that this book was in preparation, he made no attempt to verify the information set out in the book concerning Wolston and relied, he said, solely on the FBI report.

With regard to the footnote reference in the book which the District Court and the Court of Appeals both agreed appeared to state falsely that Wolston had been indicted for espionage, Barron testified that he knew that Wolston had not been indicted but that the persons to which the note referred, which included Wolston, had been convicted of espionage or falsifying information or perjury and/or contempt charges -- and that I take it meant Wolston -- following the espionage indictment of other people.

In support of the defendant's motion for summary judgment, Barron submitted an affidavit in which he says: "I was confident upon publication of KGB that the book as a whole and each and every statement in it were true, and I was aware of no fact that tended to make me doubt the truth of the book or of any statement in it." He added that "At no time have I been aware of any fact that would give me reason to doubt the FBI report or any statement in it."

QUESTION: Isn't it the rule on summary judgment that where a party defendant makes an affidavit that he not only -- you have a right to depose him but that the District Court has to resolve issues against him if they are triable issues of fact?

MR. DICKSTEIN: That is the normal rule, of course, but that is not the rule that was followed by the courts below. In fact, that is not the rule which appears to pertain

in the District of Columbia, where there is a special law that deals with motions for summary judgment in matters involving libel.

QUESTION: Well, what is the basis for any different rule in a libel case?

MR. DICKSTEIN: It seems to have been suggested that the very existence, persistence, if you would, of a law suit which can otherwise be nipped in the bud at an early stage has a chilling, an inhibiting effect upon the press which is forced to continue to defend that case through the normal processes of trial, and so summary judgment is encouraged in the District of Columbia and in the Fifth Circuit as well. That is the rule that was applied here. Because we think it is evidence from the record -- and I will refer to this -- if inferences were drawn which could fairly have been drawn, even if an actual malice standard were to have been applied, a jury could have concluded that Barron did entertain serious doubts about the truth of the allegation, the accusation that Wolston was a Soviet agent but went ahead and published anyway.

The courts below did apply the actual malice standard here, purporting to follow this Court's opinions in Gertz and Firestone. They concluded that Wolston was a public figure and crediting Barron's self-serving assertion they concluded that malice could not be shown and granted summary

judgment for the defendants. It is from that summary judgment that we have come before this Court.

QUESTION: Did you depose Barron?

MR. DICKSTEIN: We did in fact depose him.

QUESTION: And they nonetheless chose to believe his statement without a trial of fact?

MR. DICKSTEIN: That is correct, precisely. The basis for the conclusion of the courts below that Wolston was a public figure subject to the actual malice standard was that in failing to comply with the subpoena, he had voluntarily exposed himself to the publicity that might and did in fact ensue.

QUESTION: In your view, is the issue of whether or not the person is a public figure invariably a fact issue for a jury? Or where would you put it in the range, since you seem to suggest some special rules about First Amendment cases?

MR. DICKSTEIN: Your Honor, we argued in the courts below that the question of whether one is or is not a public figure in a close case would be a question for a jury. We have not raised that here and we don't argue it here because we do not think this is a close case. We think this is a case in which Wolston cannot be classified as a public figure and hence no fact issue arises which a jury would have to consider.

It is possible to postulate a case, hypothesize a case in which an individual to whom public attention was drawn as a consequence of action which was contemptuous or in any other way in violation of criminal law, could be said to have made a political statement by his conduct. The case of the Hollywood Ten is brought to mind, where in their actions which were one and the same time held to be in contempt of Congress, it was clear that they were making political statements.

If it occurred that there were fact issues and there were ambiguities as to whether or not someone is a public figure under those circumstances, then possibly a jury question might be presented. We do not think one is presented here.

The reason why the courts below held that Wolston was a public figure beyond any question of a doubt, I suppose, was that they found in his actions the kind of voluntariness which this Court they said had in mind in Gertz. Our reading of Gertz to the contrary was dismissed as too literall, too restrictive. But we submit that the significant language of this Court's opinions dealing with public persons simply cannot embrace petitioner Wolston. He had no fame or notoriety of achievement. Certainly he occupied no role of special prominense in the affairs of society, nor did he attempt to influence society with respect to the outcome of public

issues.

QUESTION: Counsel, your argument now centers on 1958 as well as on 1974, does it not?

MR. DICKSTEIN: Yes, it does.

QUESTION: If you lose on the former, if he were a public figure in '58, have you abandoned the argument that he ceased to be one in '74?

MR. DICKSTEIN: Yes, we have.

QUESTION: Could I ask why? You made the arguments in the courts below?

MR. DICKSTEIN: Yes, we did, Your Honor.

Upon reflection -- and I must say in part, at least, persuaded by the views expressed by the courts below -- we reached the conclusion that the rights of privacy and the rights of defamation are so different and apart that while it could be argued that one who had lost his right of privacy in 1958 would have had it restored by 1974; that in a work of this kind, a work which is reportedly -- and I suppose on its face to be regarded -- as a reflective work of history, if one were a public figure in 1958, one would remain a public figure for the purpose of commenting upon those same events in an historical work published in 1974. So, yes, Your Honor, we did abandon that argument.

QUESTION: Would the passage of time also serve to impose on the defendants a greater measure of operation in

the wrecklessness concept?

MR. DICKSTEIN: We think so and certainly so. In fact --

QUESTION: Haven't you lose that by abandoning your argument?

MR. DICKSTEIN: No, we don't -- as a matter of fact, it is raised in our relief brief, Your Honor, because in determining what is reasonable care, that is to be the standard, negligence is applicable here; or even in determining actual malice -- and the Court was very careful in noting in St. Amant that what the definition of actual malice would be and presumably the facts which would support it would vary from case to case. We think the circumstances are particularly important.

Here where there was an interim period between the event and the publication of 16 years, 16 years of opportunity for reflection, and four years of writing and opportunity for determination, for research, for checking out, for interviewing, and those opportunities were foregone. We believe that those circumstances demonstrate negligence in the first instance, and we believe that they would satisfy the actual malice standard as well if that were the issue here.

We do not think that one can treat this book as if it were hot news written by the Washington Post, say, on the

morning of publication of the FBI report, and so we do think there is a difference and we havene't abandoned that.

QUESTION: You say you filed a reply brief?

MR. DICKSTEIN: Yes, we did, Your Honor.

QUESTION: I assume we have it.

MR. DICKSTEIN: Being in the form of a porous case, the reply brief was not printed. I do not believe that the clerk was able to print it prior to the argument.

We agree that Wolston by his actions became newsworthy, and it is clear that if the plurality opinion in Rosenbloom were the law, the actual malice standard would be applicable to petitioner's case. But we believe it strains, in fact distorts the plain meaning of this Court's opinion in Gertz to equate petitioner's conduct with the inviting of attention and public comment, which is one of the hallmarks of a public figure.

It has been said that we read Gertz too literally, but we think the Court meant exactly what it said in Gertz. To invite means to welcome, to solicit, to court, to entice, and that is what public figures indeed do, whether they are public figures for all purposes or for single issues, for unless they attract public attention they cannot achieve their purpose. And it is precisely because they purposely seek public attention that the press is accorded more room in dealing with them.

QUESTION: Well, doesn't that approach really restrict the public figure to those who indulge in political speach?

MR. DICKSTEIN: Not at all. The public issues which I think are the concern of the cases beginning with Times v. Sullivan and its progeny are not necessarily limited to political issues. We do not so contend and I don't think the Court has so held.

There is a whole range of public issues which are matters of public concern, but the focus of course is on the activities of the plaintiff in the defamation suit, not on the surrounding circumstances which gave rise to the defamation.

There are other ways in which Wolston simply does not match up to what this Court has held a public figure to be in Gertz and Firestone. One thing is crystal clear: Unlike Wally Butts and General Walker, Wolston did not command sufficient continuing public interest, nor did he have sufficient access to the means of counterargument to be able to expose through discussion of falsehoods and fallacies of defamatory statements. One wonders how these falsehoods could have been exposed.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Dickstein.

(Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.)

AFTERNOON SESSION -- 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Dickstein, you are going to rest at this point and reserve?

MR. DICKSTEIN: I will reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Buckley.

ORAL ARGUMENT OF JOHN J. BUCKLEY, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. BUCKLEY: Mr. Chief Justice, and may it please the Court:

In Gertz, this Court stated that public figures are persons whose actions invite attention and comment in the context of a public controversy.

QUESTION: That isn't the only thing, the only definition though, is it?

MR. BUCKLEY: That's correct, Your Honor, there are other definitions. For example, there are some individuals who have attained a degree of prominence in society generally who may be public figures merely by virtue of their status. But there are other individuals who have engaged in conduct which invites if not compells public attention and comment in the context of a public controversy and therefore become public figures by virtue of that voluntary conduct.

In this case, Wolston's conduct fit that description

precisely. He failed to comply with a subpoena issued by a grand jury investigating Soviet espionage.

QUESTION: In what year was that?

MR. BUCKLEY: In 1958. That conduct occurred in the midst of a public controversy over Soviet espionage and that conduct in fact invited and resulted in attention and comment. Now, the larger controversy --

QUESTION: Mr. Buckley, would that be true of any criminal defendant then, that the press is free to libel or defame him and is subject only to liability under the public figure standards?

MR. BUCKLEY: I think that is generally the case, that a person who engaged in criminal conduct will result in being a public figure at least for a limited range of issues relating to his conviction. In this case, however --

QUESTION: Well, what if he is acquitted?

MR. BUCKLEY: Your Honor, if he is acquitted, then it poses a more difficult question. Of course, in this case the citation for contempt resulted in a plea of guilty to the charge. If a person is, however, acquitted, then there would still remain the question of whether he engaged in voluntary conduct which invited attention and comment.

QUESTION: You said he is a public figure for a narrow range of issues. You wouldn't suggest that a person who is convicted of burglary or an armored car robbery in

1958 is necessarily a public figure if he is accused of doing the same thing in 1979. He has never been heard of since. The only thing is he is accused of robbing another armored truck in 1979.

MR. BUCKLEY: Well, I would say, Your Honor, that he would not be a public figure for the purposes of comment for --

QUESTION: Although he might be with respect to the '58 episode.

MR. BUCKLEY: That's right, he would not be for purposes of a statement that he was a Soviet agent, as in this case. He may not be for some unrelated criminal conduct. He certainly would be for the criminal conduct for which he was convicted. And in this case --

QUESTION: You mean be remains a public figure if he were accused of being a Soviet agent today, he would still be a public figure?

MR. BUCKLEY: I think in this case, of course, one need not reach that result.

QUESTION: I know, but your statement a while ago indicated that, yes, he would be a public figure.

MR. BUCKLEY: If the statement was to the effect that he was in the fifties and remains today, I would submit that he could be a public figure for those purposes because the controversy is an on-going one. Now --

QUESTION: Well, he has never been heard of since.

MR. BUCKLEY: Of course, again in this case it is limited to historical comments on what he was in the 1950's.

QUESTION: How many people are arrested in New York City in any one day?

MR. BUCKLEY: Your Honor, I have no idea. I would say it was in the hundreds.

QUESTION: Would they all be public figures?

MR. BUCKLEY: I think they would all be public figures for the purposes --

QUESTION: Well, for the life of me, I can't remember the name of one of them.

MR. BUCKLEY: Well, if one looks at the rationale for --

QUESTION: How would they become a public figure if nobody ever heard of them?

MR. BUCKLEY: Well, certainly after their conviction they are I would submit a public figure for the purposes of comments on the criminal's conduct in which they engaged.

QUESTION: Would they if they had never reached the newspaper?

MR. BUCKLEY: No, because of the nature of the criminal conduct.

QUESTION: Would they if it had never reached the newspaper?

MR. BUCKLEY: Yes, Your Honor, even if they haven't reached the newspaper.

QUESTION: They are public figures.

MR. BUCKLEY: And the reason that --

QUESTION: What do you mean by public?

MR. BUCKLEY: Pardon me?

QUESTION: What do you mean by public?

MR. BUCKLEY: Well, first of all --

QUESTION: P-u-b-l-i-c.

MR. BUCKLEY: First of all, it requires conduct committed in the midst of a public controversy. Now, when someone engages in --

QUESTION: The public controversy is that a man is charged with a crime?

MR. BUCKLEY: That's right, and the controversy revolves around the conduct for which --

QUESTION: In my case, in my hypothetical, there is no controversy, he pleaded guilty.

MR. BUCKLEY: He pleaded guilty, right.

QUESTION: That takes the controversy out of it, doesn't it?

MR. BUCKLEY: Well, by a guilty plea he has confessed at being engaged in voluntary conduct that was criminal.

QUESTION: So he becomes a public figure?

MR. BUCKLEY: Yes.

QUESTION: And nobody ever heard of him.

MR. BUCKLEY: I don't think it makes any difference, for the following reasons, that --

QUESTION: Firestone didn't even go that far, did it?

QUESTION: You mean if no one ever heard about a person, they are still a public figure?

MR. BUCKLEY: According to -- let me say to begin with --

QUESTION: I assume his mother and father knew about him, but --

MR. BUCKLEY: Obviously the police were aware of his actions because that resulted in his arrest and eventually of his conviction. Let me say that in this case, we are not dealing with a totally obscure figure because as a result of Wolston's conviction for contempt in 1958, he received at that time a fair degree of publicity and at least fifteen newspapers published in two cities at the time and a book written by Boris Morros in 1959 and in an FBI report published in 1960, all of which discussed his failure to appear before the grand jury and his guilty plea to contempt, all show the notoriety which Wolston gained for himself by his unlawful conduct.

QUESTION: Would you say that was an instance of

his injecting himself into a controversy intentionally?

MR. BUCKLEY: Yes, I would say so, for this reason, that Wolston became an activist for the purpose of insuring that he did not appear before that grand jury on July 1, 1958. Initially, of course, he received a subpoena, but that is hardly a basis for complaint on his part, of course, because, as this Court has held, the law and the grand jury as its embodiment is entitled to every man's evidence. But that did not compel Wolston to do what he in fact did. He had two lawful alternatives, to comply with the subpoena or to move to quash the subpoena if he thought it to be unreasonable, oppressive or in violation of any constitutional or statutory right.

QUESTION: If he complied with the subpoena, he might get a lot more publicity than if he refused to comply, isn't that a possibility?

MR. BUCKLEY: But his conduct could not be said to be, as it can fairly be here, to have been of such a nature as to have invited defamatory comments as to have opened the door to speculation on the basis for his refusal to comply with the subpoena.

QUESTION: Now you use the phrase "invite defamatory comments." Who invites defamatory comments?

MR. BUCKLEY: I think when one engages in conduct which inevitably attracts by its very nature public comment

and attention, and especially when that conduct is criminal conduct, that it invites people to discuss his actions, particularly where the conduct is committed in the midst of a federal investigation into Soviet espionage. It sparks the public debate, it arouses the public's interest, it runs the risk of closer public scrutiny and, of course, even more than if he had mounted a rostrum, it constitutes on his part a relinquishment of some measure of his interest in the protection of his own good name, it opens the door to --

QUESTION: You really mean it invites discussion, not defamation?

MR. BUCKLEY: I well, I would say that no --

QUESTION: It doesn't invite somebody to tell a lie, does it?

MR. BUCKLEY: I would say your observation --

QUESTION: That doesn't invite somebody to tell a lie, does it?

MR. BUCKLEY: I would say Your Honor's observation is true. In every case of a public figure, including someone who runs for office, in no sense does he invite lies, but he is nonetheless a public figure. So here in this case, Wolston engaged in conduct that bears all the earmarks of public figure status under Gertz, conduct which attracted public attention in the midst of a public controversy, which ran the rusk of closer public scutiny, which constituted a

relinquishment of some measure of his interest in protecting his own good name and which invariably opened the door to speculation on the reasons for his refusal to comply with the subpoena, including the possible and related inference that he was in fact a spy.

QUESTION: Now, he is an American citizen, is he not?

MR. BUCKLEY: Yes, Your Honor, he is.

QUESTION: Now, if you were to say that an American citizen was asked to help in an inquiry into foreign espionage, refuses to assist the United States government, then I could understand your argument that he has at least -- if invited is not the right word, he must take into account that that will attract a lot of attention. That I can understand.

MR. BUCKLEY: Certainly a person who engages in criminal conduct to refuse to obey a subpoena invites comment on his actions. That is an invariable consequence of his refusal to appear and it certainly was in this case. After all, if one pauses for a moment to look at the context in which this conduct occurred, the FBI had been engaged in a ten-year investigation of Soviet espionage. The Sobles --

QUESTION: Well, certainly that wasn't public.

MR. BUCKLEY: It was at the time of the arrest --

QUESTION: The FBI's probing was published?

MR. BUCKLEY: It became public in January 1957 when--

QUESTION: That is after the fact.

MR. BUCKLEY: No, it was before the fact, when as a result of --

QUESTION: Before the fact?

MR. BUCKLEY: Before the fact, because --

QUESTION: Did you have any CIA, too, while you are at it? I thought this was secret.

MR. BUCKLEY: Well, the investigation had been going on for ten years. It culminated in the arrest of the Sobles and --

QUESTION: I thought it was secret, but you say it was public.

MR. BUCKLEY: It was a controversy that was going on because there was an investigation. It first came to the public forum in early 1957, but at that time it builds up even increasing momentum, the Sobles, Wolston's aunt and uncle, were indicted for espionage, entered pleas of guilty, and thereafter cooperated with the federal grand jury. In the ensuing months a series of additional indictments were handed down against others involved in the spy ring. The stage had thus been set for Wolston. The subject of Soviet espionage by the middle of 1958 had achieved a prominence in the public's mind. After all, it did concern national security. His failure to appear was the climax of an unsuccessful 15-month effort by the grand jury to obtain his testimony. Now --

QUESTION: Well, it sounds like that is the Metromedia plurality test, if whatever attracts public attention makes somebody a public figure.

MR. BUCKLEY: No, for this reason, that we are not relying here only on the fact that this conduct attained publicity but on the fact that the conduct by its nature invariably attracted, invited and compelled comment and attention. After all, there is the clear language of Gertz that public figures are persons who invite attention and comment in public controversies. Now --

QUESTION: But I would have thought that meant a voluntary -- that they deliberately invited.

MR. BUCKLEY: Well, let's examine that. I think the position taken by petitioner here is that to be a public figure it is not enough to have engaged in conduct attracting by its very nature attention and comments in a controversy but to have desired the publicity as well. That is I believe the nub of his theory.

Let's look at it from two standpoints. The first is from a jurists prudential standpoint. The determination of what a public figure's personal or subjective motive is I would submit a very dicy task at best. A person who engages in criminal conduct to disrupt a government ceremony may have a whole panoply of motives. Saddling the press with proving what the causative or primary motive was in engaging

in that conduct I would submit does not promote the constitutional values involved.

QUESTION: It is a dicy task to determine actual malice under the New York Times standard, too, isn't it?

MR. BUCKLEY: That's right, but I think here I don't think that important distinctions in the measure of constitutional protection afforded free speech should turn on so slippery an enterprise. But let me take it to a different stage, which is let's look at it in terms of the two values or two interests accommodated by the public figure doctrine.

Now, what this theory would require is dividing a class of libel claims, all of whom took conduct which invited and attracted public attention and controversy and comment in a controversy into two subclasses which would depend on the method by which they used to effect the controversy or to attain the notoriety.

For example, the division would be between voluntary conduct which purposely seeks notoriety and voluntary conduct which inevitably by its nature attracts notoriety, between open advocacy of a particular result and conduct which inevitably affects or has that same result.

So Wolston here says in his brief that he will be a public figure if he had mounted a rostrum and argued against his grand jury appearance, but that he shouldn't be if he merely engaged in a contempt, precluding his grand jury

appearance. The first interest accommodated by the public figure doctrine is the public's need to know. How is that need to know any less in one case than in any other? The citizen in becoming informed about Soviet espionage has as much a need to know about someone such as Wolston who commits a contemptuous act precluding the grand jury from obtaining his testimony as it would about Wolston if he merely advocated against it. Indeed, the need in this case would be greater because he didn't just talk about it, he did something about it.

QUESTION: But precisely that same dichotomy is involved in cases of libel defendants with twenty newspapers who all publish the same story. The libel plaintiff is equally damaged by all twenty of them. But if it is published with actual malice, there cen be recovery; if it is published without actual malice, there can't be, and yet the good name is equally tarnished regardless of the motive.

MR. BUCKLEY: Well, here in both instances by the same degree the conduct engaged in by the public actor, either in mounting a rostrum or in engaging in conduct, criminal conduct which attracts publicity, is the same. That is, the public's need to know is the same and there is no reason to draw a line between the two. In fact, the need to know is greater in the case where one speaks about pure conduct than in the case where one speaks about pure advocacy.

The other interest to be accommodated under the public figure standard is the reputational interests of the public figure which are regarded as less than the wholly private person because he has committed conduct which has created an enhanced likelihood of defamatory statements being made about him because he has invited indeed the very types of comments about which he now complains.

Now, surely that is true whether Wolston mounts a rostrum to argue against his grand jury appearance as it would be if he in fact took contemptuous conduct precluding his grand jury appearance. In both instances, to the same degree the conduct creates an enhanced likelihood of defamatory statements, it runs the risk of closer public scutiny and --

QUESTION: Mr. Buckley, your analogy to mounting a rostrum prompts me to ask this question. It is sort of absurd to think about anybody getting on a rostrum to argue against complying with a subpoena. That isn't the kind of public debate one gets into when he gets a legal process served on him. I notice the language in Gertz describing the public figure emphasizes being drawn into a public controversy, and in the last sentence is "he assumes special prominence in the resolution of public question." What is the public controversy or the public question that this man had prominence in, or something that could be resolved by the

public?

MR. BUCKLEY: The public controversy was the controversy over Soviet espionage and the actions --

QUESTION: What was the controversy? Everybody is against Soviet espionage. There aren't pros and cons about that, are there?

MR. BUCKLEY: Well, I don't think that the term necessarily means that it is limited to some matter that is about to be put to a referendum.

QUESTION: Well, isn't it supposedly a controversy over a debatable issue on which people in the public might disagree? Otherwise, what is the purpose of this whole area of free speech?

MR. BUCKLEY: Under that statement, it qualifies as well because in all instances, particularly in this instance, where we had a ten-year investigation by the FBI into Soviet espionage, actions by the grand jury standing well over a year and a half, there was a controversy over the subject of the --

QUESTION: What was the public controversy?

MR. BUCKLEY: The controversy was over the propriety of the actions by the public officials running the investigation, by the grand jury conducting it, it was in every sense something that related to the matters of --

QUESTION: The public controversy over whether the

investigation was being conducted properly?

MR. BUCKLEY: That's right.

QUESTION: And what did he have to do with that controversy?

MR. BUCKLEY: Because he became an activist for the purpose of insuring that the grand jury did not obtain his testimony regarding Soviet espionage and did so by his own voluntary conduct.

QUESTION: Going back a bit, I don't have the time frame in mind, but in the middle fifties was there a great deal of controversy, public controversy over the methods being used to investigate Soviet espionage --

MR. BUCKLEY: Yes.

QUESTION: -- and borderline conduct?

MR. BUCKLEY: Certainly, sir.

QUESTION: Is that the kind of controversy you are talking about?

MR. BUCKLEY: Let me say to begin with --

QUESTION: Criticism of the FBI, for example, and of the CIA?

MR. BUCKLEY: That certainly could be. Let me say to begin with though that any time the government takes actions particularly in the context of an investigation of Soviet espionage, there is a matter pertaining to the affairs of government about which the public has a right to be informed.

Now, in Firestone this Court focused on the meaning of the phrase "public controversy" and the Court held that a matrimonial dispute is not a public controversy, under the reasoning that --

QUESTION: Well, it wasn't that broad, but in the setting of that case --

MR. BUCKLEY: That's right, the dissolution of a marriage --

QUESTION: That particular case was not a public controversy.

MR. BUCKLEY: That's correct. And the Court's rationale was that at heart this was a dispute between two spouses that had only been brought into the court because of the requirements of the state, and that a dispute between two spouses in a marriage is a private domestic affair that does not qualify as public controversy.

Now, in this case there is a clear difference, the commission of criminal conduct by Wolston, if there was not already a controversy on-going, created a new one, that is a controversy involving himself on the one side and the federal government on the other.

QUESTION: How public was it? Everybody didn't know about it.

MR. BUCKLEY: Well, there were fifteen newspapers that were published at the time --

QUESTION: When did you first hear about Mr. Wolston?

MR. BUCKLEY: Me personally?

QUESTION: Yes, before he walked into your office.

(Laughter)

MR. BUCKLEY: He never came into my office.

QUESTION: Well, didn't you take his deposition?

MR. BUCKLEY: I was not on the case at the time that the deposition was taken. I came to this case --

QUESTION: Was that the first time you ever heard of him?

MR. BUCKLEY: Pardon me?

QUESTION: Was that the first time you ever heard of him?

MR. BUCKLEY: I suppose if I had been a better student and had read more widely in the area I would be able to give Your Honor a response that --

QUESTION: My next question was going to be to name one other one that was involved.

MR. BUCKLEY: Well, let me put it in this way. Obviously, first of all, there were ten individuals who were identified as Soviet agents as a result of this FBI investigation. Many of them were well known. Jack Soble, for one, his wife another, the Sterns, and on down the list. This was no secret investigation. It --

QUESTION: It is ironic to think of someone trying to conceal his activities as a spy from being a public figure.

MR. BUCKLEY: Well, I don't think it is ironic at all.

QUESTION: And that is why he did not want to testify.

MR. BUCKLEY: It is because espionage inevitably invites and attracts publicity, but it must be done covertly. If one is going to steal the plans to the hydrogen bomb, he hardly goes about it by walking in in broad daylight into the Pentagon and looking for the plans. But nevertheless, it is because of the recognition that if someone knew what you were up to, the press would indeed be interested in it by its very definition --

QUESTION: The public figure test, if you really know all about this person, then you would know he really belonged in the public domain.

MR. BUCKLEY: That's right. That's right.

QUESTION: Have you read the petitioner's reply brief, Mr. Buckley?

MR. BUCKLEY: Yes, I have.

QUESTION: I ask you because I had not read it until the lunch hour. I had not seen it. As you know, in that reply brief the distinction is made between the loss of

privacy and the public figure, and it may well be that a person who commits a criminal offense or allegedly commits one or somebody who resists a subpoena loses any claim he may have to privacy with respect to publicity of that fact, publicity emanating from his conduct. But does it follow -- and that loss of publicity serves to satisfy at least one of the interests that you have described to us. Does it necessarily follow or should it, that loss of privacy is equivalent to becoming a public figure?

MR. BUCKLEY: I don't think in each and every case, someone who is a public figure under the privacy law is so, for purposes of libel law as well. But certainly in the context of this case, I would submit that the results should be the same because someone like Author Barron in writing a book on the KGB and in discussing the more recent disclosures concerning the activities of that organization has a compelling need to refer to the history of the controversy, to the background of how these present events evolved. In fact --

QUESTION: And to be sure, when the petitioner resisted the subpoena and didn't appear, there could have been legitimate reporting of that fact and he would have had no right to hold anybody liable for reporting it because he had lost his privacy pro tonto. But does it follow, does it necessarily follow at all or that it is at all equivalent that he is thereby a public figure?

MR. BUCKLEY: I don't think it follows in each and every case, but if one looks at the earmarks of public figure status identified in the Gertz opinion, I think that in this case it follows, at least with respect to someone who engages in a criminal --

QUESTION: And one can understand that if a person becomes a candidate for governor or mayor or president or indeed if he is elected to any one of those offices, he is a public figure and he does invite adverse criticism, some of which will be false probably and he knows it is going to come and that is a true public figure. But if someone simply is arrested for robbery or held in contempt for disobedience of a subpoena, he loses his privacy but it certainly doesn't follow that he becomes a public figure and can reasonably expect or be said to have invited adverse and perhaps false defamatory comment.

MR. BUCKLEY: I think he has because the conduct by its very nature attracts attention and notoriety, criminal conduct --

QUESTION: And you are reporting the fact.

MR. BUCKLEY: Well, these are the earmarks of public figure status under Gertz.

QUESTION: Running for office is quite a different thing, isn't it, or holding public office?

MR. BUCKLEY: Well, he creates the enhanced

possibility by his criminal conduct of the very types of comments about which he now complains, and just as much as if he had run for office to have an effect upon the governmental process. The failure to appear before a federal grand jury in response to a subpoena has a direct effect, much more than it did if he had mounted the rostrum and --

QUESTION: So you say they are basically equivalent as far as the law and the Constitution goes, resisting a subpoena and running for the presidency?

MR. BUCKLEY: I wouldn't say that in order to qualify for a public figure one has to almost be a public official. But in this context, I think it was sufficient.

QUESTION: Mr. Ralph Nader is a public figure but doesn't hold any public office.

MR. BUCKLEY: That's right.

QUESTION: What if just an ordinary citizen, a secretary, a clerk in the government, is accosted on the street by a policeman who wants to arrest them and has no reason and some opinions of some courts have said that a citizen may resist an unlawful arrest, and that person does resist the arrest and gets his name in the paper and on the evening television news, does that make him a public figure?

MR. BUCKLEY: Well, it would depend on whether he in fact engaged in criminal conduct. That's what this case is all about, commission of criminal conduct.

QUESTION: Just what I have said to you

MR. BUCKLEY: And later on --

QUESTION: No court has yet decided whether he has engaged in criminal conduct here.

MR. BUCKLEY: Oh, I think it might well depend on an examination of what happened thereafter. If eventually he was convicted --

QUESTION: I would like to bring you back to my Brother Stewart's point, a very simple question: If in 1950 an incident occurred when a man was admittedly a public figure that you and I and everybody else agree on, and something was published in 1970 and he has now gone in a monastery, what would happen on this --

MR. BUCKLEY: If the public controversy was still alive I think he would still be a --

QUESTION: Would that be the determining factor, whether the controversy was still alive?

MR. BUCKLEY: If the comment pertained to --

QUESTION: The comment pertains solely to what he did in 1950.

MR. BUCKLEY: He is a public figure for those purposes, yes.

QUESTION: And then what is published in 1970 is protected even though in 1970 he is in a monastery?

MR. BUCKLEY: I think it is impossible to write a

book such as KGB without referring to the history of the activities of that agency, and certainly I think it would not make sense in that regard to have on every page the constitutional standard varying back and forth depending on the time period in which the conduct or the comment refers to.

QUESTION: But you are libeling, you are injuring a man who is a private figure.

MR. BUCKLEY: He is a public figure.

QUESTION: In 1970 he is in a monastery, it is rather private.

MR. BUCKLEY: He is still a public figure for the limited range of issues relating to his earlier conduct.

QUESTION: That is your position?

MR. BUCKLEY: That is.

QUESTION: Mr. Buckley, would you say he is a public figure if he hadn't been convicted for contempt?

MR. BUCKLEY: I think that would create a much more difficult question because -- I am not saying he necessarily would not be, because the criminal law imposes standards that are different than those imposed for determining whether someone is a public figure. For example, proof beyond a reasonable doubt, specific criminal intent, one might engage, of course, in conduct that is not criminal and still be a public figure and --

QUESTION: If I am accused of a crime and for some kind of pretrial or during trial conduct I am convicted of contempt, criminal contempt, but I haven't been convicted of any other crime, and then the newspaper makes some comments about me that are libelous, they refer to me as the one who committed the offense for which I am on trial and I am acquitted. Am I a public figure?

MR. BUCKLEY: Well, if you are acquitted of the charge --

QUESTION: Is it just because I am convicted for contempt, is that enough to --

MR. BUCKLEY: In this case it certainly is because the --

QUESTION: In my case. In my case.

MR. BUCKLEY: In your case the lawyer eventually was not convicted for contempt.

QUESTION: No, he is convicted of contempt but he is quitted of the crime for which he was on trial. I am charged with a crime of safe cracking and then in pretrial proceedings or hearing trial I am convicted of contempt, criminal contempt.

MR. BUCKLEY: You are --

QUESTION: Do I right then and there become a public figure or was I already just because I was accused?

MR. BUCKLEY: No, after you are convicted, to be

sure --

QUESTION: Of criminal contempt

MR. BUCKLEY: Right and --

QUESTION. And anything they might say about my guilt for safe cracking is subject to the public figure standard?

MR. BUCKLEY: I am not arguing that here. I am not saying that.

QUESTION: But you are.

MR. BUCKLEY: But I am saying that if there was any -- if you became a public figure as a result of your conviction for contempt, then for purposes of a limited range of comments relating to that contempt you would be a public figure, but not necessarily --

QUESTION: But not without the contempt?

MR. BUCKLEY: That's right.

QUESTION: Then why in this case are you a public figure for anything else except just commenting about your defying a grand jury subpoena?

MR. BUCKLEY: That is what the comment was in effect about, because the failure to comply with the subpoena was --

QUESTION: In effect without accusing him of being a spy?

MR. BUCKLEY: It opened the door to speculation

I would submit for a range of issues relating to possible reasons why he did not comply with the subpoena, one possible inference being, of course, that he was a Soviet spy and this conduct occurred in the context of a major controversy over Soviet espionage. Let me say that there is no contention here that Wolston was the prime actor in the entire controversy, but he was at least a supporting actor who was starring in his own sub-plot with a script he largely authored by his own contempt and therefore became part of a larger drama.

QUESTION: Now, what if having been convicted either by a government employee going home from work and resists arrest or Mr. Justice White's hypothetical case, first there is a conviction for contempt or whatever, you say that automatically makes him a public figure?

MR. BUCKLEY: If one engages in criminal conduct, I think it does.

QUESTION: Now, on appeal it is reversed, then is he a non-public figure?

MR. BUCKLEY: Not necessarily. In a certain way you are going to --

QUESTION: You mean you are going to penalize him for taking an appeal?

MR. BUCKLEY: Well, one can engage in conduct that is not criminal and yet be a public figure.

QUESTION: But we are dealing with something near to your case, the criminal conduct that you have described.

MR. BUCKLEY: I think that --

QUESTION: Well, he certainly can't be in and out as a public figure.

MR. BUCKLEY: Always the question is what was the underlying voluntary conduct. It may have been criminal or non-criminal. If it was criminal, I would submit there is a strong indication that that conduct, criminal conduct by its nature attracts public attention and comment.

QUESTION: Mr. Buckley, it seems to me that you have spent a good deal of your time defending an issue that is not before us, as I understand it. You don't have to defend the position that anyone convicted of any crime at any time becomes a public figure.

MR. BUCKLEY: No, Your Honor, I don't.

QUESTION: As I understand your brief and as I understood the opinion of the District Court and the Court of Appeals, this man became a public figure in the opinion of those courts only because he was convicted of contempt in the context of the great furor in this country that existed at that time with respect to Communist espionage. Now, why don't you confine your position to that?

MR. BUCKLEY: Your Honor, I was trying to be

helpful to the Court, members of the Court who wanted to broaden the question under examination. But the whole point of this is that this was not routine crime as all of the hypotheticals put involved but, rather, real major controversy involving a ten-year FBI investigation, a grand jury that had handed down a series of indictments against others for espionage.

QUESTION: Mr. Buckley, let met just ask one question. I realize your opponent has pretty much abandoned the argument, but on the question of the time gap between when the conduct occurred and when the book was written, do you think it is appropriate to have the same standard of care for the writer who has to meet a deadline as it is for historians?

MR. BUCKLEY: I think so, because -- especially with respect to --

QUESTION: But historians should equally have the same latitude to be really make notice of falsehood before he has to be careful about what he says about it.

MR. BUCKLEY: I think for two reasons. First of all, the public's need to know is the same.

QUESTION: Well, would that serve the public's need to know or would it serve the public's need to know to say, well, if you are going to write a history, be careful?

MR.BUCKLEY: Well, in writing -- few things are

pure history. The KGB is not pure history. Some of it involves more recent activities of the KGB. Should one delay publication of this hot news in a sense about the more recent activities because one has to spend more time investigating under a different standard of liability the history of the controversy, I don't think that makes sense because --

QUESTION: Well, he had four years to write this book, didn't he?

MR. BUCKLEY: He did, four years in writing the book and his reliance was placed upon an official report of the FBI, the accuracy of which had never been called into question.

QUESTION: Well, maybe he wasn't -- I am not suggesting that. Maybe they were totally -- had good defense there. But just on the question of the standard of the author, does it really seem reasonable to say that an historian should have the same latitude when he has plenty of time to research and presumably writes something that has a stamp of careful research on it as opposed to the reporter who has to meet a deadline and get in before 4:30 or whatever the time the story has to be filed?

MR. BUCKLEY: Well, in the present context there were more recent activities of the KGB itself.

QUESTION: This wasn't a recent activity.

MR. BUCKLEY: No, this wasn't. But in order to illuminate, give meaning, give context to discussion of the more recent activities, it is necessary to give history. If one operates on a theory that you should take longer to write the background, that will delay the publication of those matters that are more current, and therefore I think the policy defeats itself because the two are really related.

QUESTION: Under Gertz what might be negligence for a news magazine, a weekly news magazine might not be negligence, culpable negligence for the reporter of a daily newspaper.

MR. BUCKLEY: That is certainly true.

QUESTION: And then if you are writing a history, it springs out.

MR. BUCKLEY: The standard --

QUESTION: This is why I asked your opponent why he abandoned the passage of time argument.

MR. BUCKLEY: Well, that I think is not relevant as to the standard of liability, that is actual --

QUESTION: That has to be your position.

MR. BUCKLEY: That's right. I don't think that the definition of actual malice changes because the publisher is a news reporter versus an historian. The standard is the same, was the comment published with a high degree of

awareness of probable falsity, as the Court stated in --

QUESTION: Well, if there is an element of wreck-lessness in it, there is a difference.

MR. BUCKLEY: I don't really think so because the policy underlying the actual malice standard is getting at the calculated falsehood. I don't see --

QUESTION: Mr. Buckley, am I right in understanding Mr. Dickstein and is he right in saying if I am right in understanding him to say so, that the District Court simply accepted at its face value the affidavit of an interested defendant, that he intended no malice and granted judgment on that basis?

MR. BUCKLEY: That is no so. First of all, with respect to the statement that Wolston had been identified as a Soviet agent as a result of an official investigation, it was undisputed that Barron relied upon an official report of the FBI which so identified him. So there was no evidence here of knowledge of falsity or wreckless disregard.

Now, in addition to that, Barron submitted an affidavit and was deposed and in that context swore that he believed the truth of his publication.

QUESTION: But there is no reason why the District Court has to believe that and a motion for summary judgment.

MR. BUCKLEY: On the motion for summary judgment, if the court can grant summary judgment, if there are no

contrary inferences that can fairly be drawn from the evidence. If --

QUESTION: But an interested party't testimony can always be disbelieved by a jury.

MR. BUCKLEY: If it stood alone, but it didn't stand alone here. One had the FBI report which itself in fact identified Wolston as a Soviet agent. I think that in the reply brief, the petitioner candidly admits that his position is that a plaintiff in a libel case has no obligation to introduce evidence contradicting the sworn assertions of a publisher as to his belief in the truth of his publication. It would have --

QUESTION: The burden is on the party moving for summary judgment and the credibility of interested witnesses for the jury. Do you dispute either of those propositions?

MR. BUCKLEY: No.

QUESTION: Then why should your party have gotten summary judgment here?

MR. BUCKLEY: Because there were no contrary inferences which could be fairly drawn from the evidence involved in this case. How can reliance upon an official report of the FBI unequivocally categorically identifying someone as a Soviet agent constitute proof in any sense of actual malice. Were it so, then historians and newscasters would report the official findings of such agencies at their

peril, because under petitioner's view there must always be a costly trial irrespective of the evidence, and he is under no obligation, in his view, to present evidence to the contrary, putting in issue as he must a genuine issue of material fact.

MR. CHIEF JUSTICE BURGER: I think we have detained you unduly long, Mr. Buckley.

MR. BUCKLEY: Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Dickstein, do you have something further?

ORAL ARGUMENT OF SIDNEY DICKSTEIN, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. DICKSTEIN: Yes, I do, Your Honor.

We would probably have a quite different case here if Mr. Wolston had challenged the FBI's right to investigate into espionage or the right of the United States government to issue a suhpoena compelling his attendance before a grand jury conducting such an investigation.

But one thing is quite clear even on this abbreviated record and that is that the only justification, the only excuse that Mr. Wolston ever gave for not complying was his physical and mental condition at the time the subpoena was issued.

He did not take a position in this public controversy with a view toward influencing it. Indeed, if one

looks at the contemporaneous newspaper articles, they are replete with references to "he refused to comment," "he disappeared," "he could not be reached." And when you read the article concerning the event of the trial, it certainly appears as if the reason why he terminated the trial and plead guilty was because he wanted to resist any further intrusion into his privacy and the privacy of his family. We are not --

QUESTION: Suppose the witness was subpoenaed in these same circumstances, instead of just refusing to appear and taking all the consequences of a contempt citation and so forth, decided to go to one of the Caribbean islands or South American countries and then there would be a good many newspaper accounts, assume newspaper accounts that he had fled the country. And then perhaps when extradition proceedings were started to get him back, he moved to some South American country that has no extradition treaty with the United States and you had another series of stories. Do you think that might at some stage bring him into the public figure category?

MR. DICKSTEIN: Not as I understand the teaching of this Court's opinions in Gertz and Firestone. We are not suggesting that this Court should assume that Wolston's actions were non-volitional for purposes of determining whether or not he was a public figure. In fact, we are

prepared to have the Court assume that they were volitional, that he did not obey the subpoena and that he was properly plead.

But that is not the kind of activity that we understand is spoken of in Gertz and in Firestone as to making him a public figure.

Mr. Buckley has asserted that this is a very evanescent proposition. How can the press expect to know what Wolston's state of mind was when he failed to obey the subpoena? He never suggested that for one moment. What we have said is that there is not a scintilla, there was not a scintilla of indication that Wolston was refusing to obey a subpoena in order to have impact upon the processes of controversy, the dispute, in order to persuade the public of a position, much like the analogy that I employed in my opening argument with respect to the Hollywood Ten. No guesswork was required here.

But what of the standard that Mr. Buckley does advocate? He suggests that perhaps when someone has been convicted of a crime, some special things occur. At that point at least he becomes a public figure. Well, if one thinks about guesswork in terms of assessing concrete facts then self-evident, what about the crystal-balling that would be involved in application of such a standard? The press would rightfully complain how can we possibly know

how much breathing space we have, how much room we have for error in commenting upon this man's conduct in the trial and his background if we have to wait until conviction and final judgment before we know whether or not and what we can say.

Indeed, I dare suggest that given the criminal processes which fortunately were speeded up somewhat in this country, in most instances the statute of limitations on libel in most jurisdictions would have run long before the press could fathom the extent of the room which it was being allowed by such a standard.

To be sure, Mr. Wolston has been stripped of his privacy, but that does not mean that he is thereby to be made a subject of additional sanction at the behest of the Reader's Digest. Judge Kashin twenty years ago decided what was an appropriate sanction.

With regard to the question of actual malice and your questions, Mr. Justice Rehnquist, if the actual malice standard was applicable here, and we say it is not, but if it were held to be the question would then be whether Barron had serious doubts about the truth of the statement that Wolston was a Soviet agent but went ahead and published it anyway.

Now, lest we be misunderstood, we are not suggesting -- and I answered before, Mr. Justice Blackmun -- that

there is a varying standard depending upon the length of time that has occurred since the events which ostensibly or purportedly make one a public figure. We say the standard is the same, but the manner in which that standard is to be applied is not rigid, it must take into consideration, and particularly if one is going to ascribe to the balance the accommodation of interests referred to in Gertz and predecessor opinions, one must take into consideration the circumstances of publication. And hence whether you are talking about actual malice or negligence or the minimal standard of fault permissible by Gertz, we think it completely appropriate that the trier of fact, the jury in this instance, have the opportunity to determine whether or not whatever standard of care is to be employed was employed under these circumstances.

When Barron testified, when Barron submitted an affidavit that he had no doubt whatever about any statement in his book, I submit that such extravagant overstatement should have been self-impeaching. Instead, it was fully credited. When he said, yes, I knew about Morros' view of Soble's credibility, that he was a confirmed liar, but I didn't rely upon that, I relied upon the FBI report and did the two put together create any doubt in my mind --

QUESTION: Mr. Dickstein, he is a confirmed liar as all agents are confirmed liars, aren't they, all spies?

I don't really understand your theory about why that should have put him on notice that his statement after he had acknowledged his status as a spy would necessarily be suspect.

MR. DICKSTEIN: Your Honor, there is so much in that book which is just completely inconsistent, that is in which Slava is described, is completely inconsistent with Wolston, a man as he lived. There is more than that. We are talking about an accusation made, a statement, a report, if you will, filed by the FBI in 1960, at a time when it was known that accusations of this kind were rampant and often overstated. We have a period of time which ran since. We also have the indisputable fact known to Barron --

QUESTION: None of those things would put the author on notice that maybe this statement was false.

MR. DICKSTEIN: There are other circumstances, Your Honor. I am not necessarily saying on notice. I think the man was on notice, and the question was what was his own self assessment as to the extent to which he entertained doubts. The mere fact as he knew it that Wolston was in the grip of federal prosecutorial power and yet was never indicted for espionage should have said something to him. All of these things -- Barron's testimony at deposition was not only extravagant and self-serving, some of it sounded like a lawyer's post litem inventions. That in and

of itself should have enabled us to challenge his credibility. This over-broad statement with respect to every proposition in his book being true, that should have been a basis for assessing his credibility. The fact that he saw no need to research, despite the fact that he had these facilities --

QUESTION: But even if you consider he was totally impeached, just remove all testimony from the record, you still have some affirmative burden of showing a knowledge of falsity. I am trying to find out how you discharge your affirmative burden. Maybe you can eliminate his affidavit. Let's strike it from the record. What have you got left?

MR. DICKSTEIN: Given the facts that we have, if a jury believes that Barron was lying, we think that that alone is --

QUESTION: Maybe they won't put him on the witness stand. Maybe they won't even put him on the witness stand.

MR. DICKSTEIN: Oh, but I would, Your Honor.

QUESTION: Oh, I see.

QUESTION: Well, they might believe he was lying, but that doesn't necessarily follow that anything was untrue, does it?

MR. DICKSTEIN: If there are facts and circumstances which --

QUESTION: Just because a jury can disblieve and

disregard his affidavit doesn't mean they have to conclude that he absolutely knew or suspected that something was false.

MR. DICKSTEIN: Standing by itself, that those were the facts here, that might be the case, but it does not stand by itself, because there are --

QUESTION: Say the mental element could be satisfied if there are obvious reasons to doubt the veracity of the informant or the accuracy of his report. Now, as Mr. Justice Stevens asked you, how do you satisfy that burden of proof? What obvious reasons were there for the defendant to doubt the accuracy of his information objectively?

MR. DICKSTEIN: Objectively, there was the fact that Wolston was never indicted for espionage, there was the fact that Soble who, while the witness denies that that was the only basis for the FBI report, was characterized as a liar by one who knew him best. There were facts in the FBI report and in the Morros book which demonstrably had no bearing and no connection with Wolston, they could not be one and the same person. There was the fact that in the Morros book, Morris clearly suggests that in his view Soble was putting him on in order to get some money out of him, in order to cool him, what he refers to with respect to Soble's always declining, always finding excuses so that Morros could not meet Wolston --

QUESTION: So you say at least there was a jury question about that?

MR. DICKSTEIN: Exactly, and this case was disposed of on summary judgment.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:55 o'clock p.m., the case in the above-entitled matter was submitted.)

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